NO. 83-255

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALBERT B. BENSON and VIKTOR E. BENSON,
Petitioners,

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to
the Supreme Judicial Court for the
Commonwealth of Massachusetts.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Although analysis of the two cases indicates that the issues of ultimate fact are not the same, should the doctrine of collateral estoppel bar the defendants' prosecution for conspiracy to commit arson solely because they were acquitted on the substantive offenses of arson and breaking and entering with intent to commit arson?

2. Does the doctrine of collateral estoppel present any obstacle to the Commonwealth's using, as part of its proof in its prosecution for conspiracy, the same evidence it introduced in its prosecution of the defendants for the substantive offenses of arson and breaking and entering with intent to commit arson?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 389 Mass. 473 (1983) and is set forth beginning on page 1a of the petitioners' Appendix. The other pertinent opinions and findings and rulings are also accurately reflected in the petitioners' Appendix

JURISDICTION

In view of this Court's decision in Bullington v. Missouri, 451 U.S. 429, 437 (1981), which indicates that a state court judgment rejecting a petitioner's double jeopardy claim is "final" within the meaning of 28 U.S.C. §1257 and its decision in Abney v. United States, 431 U.S. 651, 657-662 (1977); and Harris v. Washington, 404 U.S. 55, 56 (1971) respondent is not dissatisifed with petitioners' statement of jurisdiction under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Petitioners' statement of the case accurately reflects the pertinent information. This same information is set forth in the opinion of the Supreme Judicial Court. Accordingly, the facts will not be repeated herein.

Reasons For Not Granting The Writ

I. THE SUPREME JUDICIAL COURT PROPERLY REVIEWED ALL THE RELEVANT MATERIAL AND CORRECTLY APPLIED THE DECISIONS OF THIS COURT WHEN IT HELD THAT THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT BAR PROSECUTION OF THE DEFENDANTS FOR CONSPIRACY TO COMMIT ARSON SINCE THE ISSUE OF ULTIMATE FACT IN THE PENDING CONSPIRACY TRIAL IS DISTINCT FROM THE ULTIMATE ISSUE IN THE DEFENDANTS' TRIAL FOR THE SUBSTANTIVE OFFENSES OF ARSON AND BREAKING AND ENTERING WITH INTENT TO COMMIT ARSON.

The defendants' peition is a veiled copy of the same argument which they presented to the Massachusetts Supreme Judicial Court, (A.1a); the Court of Appeals, (A.39a); District Court, (A.31a); and to two justices of the state trial court, (A.11a, 26a). On each occasion, the justices reached the same conclusion--that the pending prosecution is not barred by the doctrine of collateral estoppel. Once

again, however, the defendants' try to mine this vein and argue that the Commonwealth should be barred from the pending prosecution because the core of its case is the same as that in the previous trial. (Pet. 10).

The doctrine of collateral estoppel provides that once an issue of ultimate fact has been determined, that issue cannot be relitigated between the same parties in a subsequent case. Ashe v. Swenson, 397 U.S. 436, 443 (1970). But the doctrine only bars a prosecution in the instance when the jury could not have rationally based its verdict on an issue other than that which the defendant seeks to foreclose. Id. at 444. See Ottomano v. United States, 468 F.2d 269, 272 (1st Cir. 1972), cert. denied 409 U.S. 1128 (1973).

The burden falls on the one who seeks the doctrine's protection to establish that "the issue of fact which [he seeks] to foreclose from consideration in the subsequent proceeding was necessarily determined in [his] favor by the verdict in the prior proceeding." Commonwealth v. Shagoury, 6 Mass. App. 584, 589; appellate review denied, 376 Mass. 936 (1978), cert. denied, Shagoury v. Massachusetts, 440 U.S. 962 (1979).

The Supreme Judicial Court, as is required by the decisions of this Court, reviewed the entire proceedings as a whole, in a realistic and practical manner, to determine what issues were, or should have been decided at the first trial. (A.6a) See Sealfon v. United States, 332 U.S. 575, 578-579 (1948);

Ashe v. Swenson, supra. Moreover, in its review, the court was mindful that "a substantive offense and a conspiracy to commit that offense each constitute a distinct offense and each may be separately punished." (A.7a) Commonwealth v. French, 357 Mass. 356, 393 (1970). The court also recognized that an acquittal on the substantive offense will not automatically bar prosecution on the conspiracy to commit the same crime. (A.7a, 8a, 17a); Commonwealth v. Gallarelli, 372 Mas. 573, 576-577 (1977); Commonwealth v. Shea, 323 Mass. 406, 411 (1948); United States v. Cioffi, 487 F.2d 492, 498 (2nd Cir. 1973), cert. denied, Ciuzio v. United States, 416 U.S. 995 (1974); United States v. Lee, 622 F.2d 787, 790 (5th Cir. 1980). Additionally, the

court noted that at the time of the first trial, M.G.L. c.278, §2A restricted the simultaneous prosecution of the substantive crime and the conspiracy to commit the same substantive offense. (A.3a, fn3).

The defendants now argue that the Commonwealth is attempting to relitigate the issue of "identity" under the nominal rubric of conspiracy, an issue which they maintain was "necessarily determined adversely to the Commonwealth at the first trial." (Pet. 11,13,14) But the Supreme Judicial Court compared the evidence in the first trial to the proffered evidence in the pending case. See Commonwealth's Trial Memorandum, (A.82a) and Affidavit of Defendant's Counsel, (A.72a). Based on this comparison, it concluded that the

essential element in the arson trial was not identity, rather it was the wilful burning of the building and that in the pending conspiracy case, the key element will be the unlawful agreement. (A.7a) See M.G.L. c.255, §2; Commonwealth v. Niziolek, 380 Mass. 513, 526 (1980); Commonwealth v. Dyer, 243 Mass. 472, 483 (1922).

Petitioners also assert that the jury "conclusively established that [they] did not set the fire or aid, counsel and procure the burning of the building." (Pet. 12). Within this assertion, they criticize the Supreme Judicial Court for its failure to unequivocally determine the basis for the jury's verdict. They quote from the decision wherein the court said that "in accordance with the trial judge's

instructions, the jury may have acquitted the [defendants] because they concluded that the fire was not set or because they concluded that there was no active participation by the defendants with the person who set the fire." (A.9a).

When this language is examined in the context of the court's entire decision, it appears to be no more than dictum. It was clearly not intended to represent the court's unwavering explanation of why the jury found as they did. Even if this were the reason for the verdict, the pending prosecution would not be barred. When a court analyzes a case in the context of a collateral estoppel claim, its responsibility is solely to determine the issue of ultimate fact. It need not

glean from the verdict the precise reason the jury decided as they did.

There are additional reasons why petitioners' criticism of this dictum is unfair. What they now contend was "uncontroverted" (testimony that the fire was set) (Pet. 8) was something they never conceded as an indisputable fact during the trial. Moreover, the nub of their defense was to sow the seed that someone else who was in the building along with them at the time, was probably responsible for setting the fire; if it indeed was set. (Trial transcript 833-860) It is understandable, therefore, how the possibility of an accomplice in a joint venture arose. And it was likewise appropriate for the various reviewing courts to refer to this possibility and

the associated evidence as a factor which may have influenced the jury's verdict.

The Supreme Judicial Court noted in its decision the "difficulties often encountered with respect to a general verdict of 'not guilty'". (A.9a) United States v. Kramer, 289 F.2d 909, 913 (2nd Cir. 1961). It pointed out that it is "the rare case where it [is] possible to determine with certainty what the jury in the earlier prosecution had decided". (A.9a) United States v. Cioffi, 487 F.2d 492, 498 (2d Cir. 1973).

What the petitioners apparently fail to recognize is that a "finding of not guilty at a criminal trial can result from any number of factors having nothing to do with the defendant's actual guilt." (A.9a) Commonwealth v.

Cerveny, 387 Mass. 280, 285 (1982). Thus the fact that the court only alluded to two possible explanations of why the jury might have decided as they did is not determinative. The mere fact that the court only mentioned these two does not mean that all other reasons are necessarily excluded. See Commonwealth v. Cerveny, supra, at 285.

In the the end, the Supreme Judicial Court reasoned that the relationship between the result in the prior proceeding and the evidence proposed in the pending case is at best "tenuous and speculative", hence the doctrine of collateral estoppel is not implicated. (A.9a) The Supreme Judicial Court concluded that "since the jury may have reached its decision rationally on some issue of ultimate fact other than that

the defendants were not in any way responsible for the fire, the defendants have not met their burden of proving that this fact was necessarily determined by virtue of the general verdict of acquittal". (A.9a) See Commonwealth v. Shagoury, supra; United States v. DeVincent, 632 F.2d 147 (1st Cir.) cert. denied, 449 U.S. 986 (1980).

This conclusion accords with the findings of the state trial court and the district court. Both found that several rational bases existed which could explain the acquittals and that the verdict did not necessarily mean that the defendants bore no responsibility whatsoever for the fire. Furthermore, it was clear to them that the defendants were not acquitted of having made an unlawful agreement to commit the arson. (A.17a, 35a)

II. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT FORECLOSE THE COMMONWEALTH FROM USING THE SAME EVIDENCE IN THE PENDING CONSPIRACY TRIAL THAT IT INTRODUCED IN THE RELATED TRIAL OF THE SUBSTANTIVE CRIME SINCE THE ESSENTIAL FACTS IN THE TWO CASES ARE NOT THE SAME.

Generally the doctrine of collateral estoppel is invoked to bar a prosecution altogether. But it can also be marshalled to prevent the use in a subsequent proceeding of an argument or facts that establish an essential element already litigated in the defendant's favor in the first trial. (A.6a) See United States v. Lee, 622 F.2d 787, 790 (5th Cir. 1980); United States v. Cioffi, 487 F.2d 492, 498 (2d Cir. 1973). The doctrine, however, will not automatically foreclose in a conspiracy trial, evidence of overt acts which tend to prove the substantive offense just because the substantive

offense and the conspiracy stem from the same incident. (A.9a, 18a) Commonwealth v. Gallarelli, supra at 577; Commonwealth v. Shagoury, 6 Mass. App. Ct. supra at 588-590; United States v. DeVincent, 632 F.2d 147, 160-161 (1st Cir.) supra. Yawn v. United States, 244 F.2d 235, 238 (5th Cir. 1957) (Tuttle, Cir. J. concurring). Once again the defendant has the burden of establishing that the issue of fact which he seeks to foreclose from consideration was necessarily determined in his favor. (A.16a) United States v. Tramunti, 500 F.2d 1334, 1346 (1974); United States v. King, 563 F.3d 559, 561 (2d Cir. 1977); Commonwealth v. Shagoury, supra.

Petitioners mistakenly assert that the Commonwealth will try to prove the conspiracy by proving the commission of

the underlying offense. The Commonwealth's theory of prosecution is not so sinister. It does intend as part of its proof to introduce evidence in the conspiracy case that it used in the arson trial. Both the Supreme Judicial Court and the Court of Appeals has given it permission to do so. The Supreme Judicial.Court stated that there will be no bar to the introduction of this evidence which tends to create inferences that the defendants set the fire. (A.8a, 47a) Since the essence of the conspiracy is the unlawful agreement, the Commonwealth will argue that this agreement can be established in part using the circumstantial evidence surrounding the fire and whatever damaging inferences that may arise therefrom. The defendants

acknowledge that this is a permissible trial tactic. (Pet. 13) Attorney General v. Tufts, 239 Mass. 458 (1921); Commonwealth v. Shea, 323 Mass. 406 (1948); Commonwealth v. Binkiewicz, 342 Mass. 740 (1961). The Commonwealth's proof will go beyond being a mere reiteration of the evidence presented in the first trial. (See Commonwealth's Trial Memorandu, A.82a) The focus will be on the circumstantial evidence which suggests motive in the conspiracy. This evidence was neither presented nor available at the first trial.

To avoid any possible prejudice to the defendants' rights, safeguards do exist short of barring the prosecution altogether. The defendants will be able to object during the course of the trial at any time that they feel the doctrine

of collateral estoppel is being implicated. (A.47a) Furthermore, they are not precluded from requesting a cautionary of limiting instruction on why the evidence of the fire is being admitted.

Since the essential fact of the unlawful agreement was not an issue at the prior trial, the Commonwealth cannot now be required to truncate its evidence and eliminate those parts which might suggest that the defendants participated in an agreement to commit the crime of arson.

CONCLUSION

Respondent submits the Supreme Judicial Court correctly applied the decisions of this Court and that the doctrine of collateral estoppel in no way operates to bar the present prosecution. The questions presented by petitioners do not warrant review by this Court on certiorari and their petition should therefore be denied.

Respectfully submitted,

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